1995

State of Utah v. Allen G. Tenwolde : Brief of Appellant

Utah Court of Appeals

E. Neal Gunnarson; District Attorney for Salt Lake County; Thomas P. Vuyk; Deputy District Attorney; Attorneys for Plaintiff/Appellee.
Herschel Bullen; Attorney for Defendant/Appellant.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	)	
	)	
Plaintiff/Appellee,	)	**BRIEF OF APPELLANT**
	)	
vs.	)	
	)	
ALLEN G. TENWOLDE,	)	Case No. 950406-CA
	)	
Defendant/Appellant.	)	Argument Priority No. 2

APPEAL FROM THE FINAL JUDGMENT OF THE THIRD CIRCUIT COURT, WEST VALLEY DEPARTMENT, SALT LAKE COUNTY, UTAH THE HONORABLE WILLIAM A. THORNE, PRESIDING

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Attorneys for Plaintiff/Appellee

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules

Statutory Provisions

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Appellant.	)	

JURISDICTION

Jurisdiction properly lies in the Utah Court of Appeals pursuant to § 78-2A-3(2)(f), U.C.A., as amended.

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue Presented:

Whether the trial court erred in failing to find that the prior decision of the Drivers License Division (the "division") to take no action regarding the defendant's/appellant's driver's license for driving under the influence of alcohol constitutes jeopardy of punishment, thus barring a second prosecution for

driving under the influence of alcohol under § 41-6-44, U.C.A., pursuant to the Fifth Amendment, United States Constitution, and Article One, Section 12, Utah State Constitution.

Standard of Review:

The decision of the trial court was based upon an agreed set of facts. Therefore, the issue before this court involves review of the trial court's determinations of law. Such matters are reviewed under a "correctness" standard, wherein the "appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *State v. Pena*, 869 P.2d 932, 935 (Utah 1994).

Preservation of Issue for Review:

The issue presented was preserved for appellate review pursuant to a plea of guilty to a class B misdemeanor. The plea was taken under Rule 11(i), *Utah Rules of Criminal Procedure*, and conditioned upon the defendant (hereinafter referred to as "appellant") being allowed to appeal the prior decision of the court denying appellant's Motion to Dismiss asserting the issue of double jeopardy, pursuant to stipulation (R. 132) and court order dated June 22, 1995 (R. 134).

CONSTITUTIONAL PROVISION STATUTES, ORDINANCES RULES AND REGULATIONS

A. The following constitutional provisions have direct application in this matter.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

The Utah State Constitutional provision, Article One, Section 12, likewise states in pertinent part:

> . . . nor shall any person be twice put in jeopardy for the same offense.

B. Statutory Provisions, copies of which are appended hereto are as follows:

> Section 41-6-44, *Utah Code Annotated*
> Section 41-6-44.10, *Utah Code Annotated*
> Section 53-3-223, *Utah Code Annotated*
> Section 53-3-227, *Utah Code Annotated*

STATEMENT OF THE CASE

This appeal is from the decision of the trial court denying appellant's Motion to Dismiss asserting the issue of double jeopardy (R. 120).

The claim of double jeopardy is based upon the fact that prior to the criminal prosecution in the Third Circuit Court the appellant had appeared for the purpose of a "per se" hearing before the Drivers License Division regarding suspension of the

appellant's driver's license pursuant to § 53-3-223, U.C.A. As a consequence of the "per se" hearing, the division determined to "take no action" and not suspend the appellant's driver's license (R. 47-50).

Subsequent to the division's action but prior to the scheduled trial date the appellant moved to dismiss the prosecution in the Third Circuit Court based upon grounds of double jeopardy, asserting that the "per se" hearing amounted to jeopardy upon a first prosecution thereby barring a second prosecution for the same offense pursuant to the Fifth Amendment of the United States Constitution and Article One, Section 12, Utah State Constitution. Appellant's Motion to Dismiss (R. 28), supported by memorandum (R. 30).

On or about April 29, 1995 the trial court issued its Decision on Motion to Dismiss, denying the motion (R. 120). Thereafter, pursuant to stipulation, the appellant entered a plea to Count I of the Information as amended, driving under the influence of alcohol pursuant to § 41-6-44, U.C.A., a class B misdemeanor, said plea being conditioned upon reservation of the right of appellant to appeal the decision of the court with respect to the issue of double jeopardy, entered on or about April 18, 1995, pursuant to Rule 11(i), *Utah Rules of Criminal Procedure* and *State v. Montoya*, 887 P.2d 857 (Utah 1994). (Stipulation, R. 132; Order, R. 134.)

This stipulation and order merely acknowledge and further memorialize the proceedings before the court as indicated in the docket entry of May 26, 1995, ". . . Def COP pursuant to State v Sery. . . ." (R. 142).

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

The following statement of facts is taken from appellant's Memorandum in Support of Motion to Dismiss (R. 30-91). The State stipulated to the facts as set forth therein (R. 94).

In or about October 8, 1994 the appellant was arrested in Salt Lake Count by a Salt Lake County Sheriff's Deputy and cited for driving under the influence of alcohol pursuant to § 41-6-44, U.C.A. Pursuant to said citation, the appellant was given notice of intent to suspend his Utah driver's license pursuant to § 53-3-223, U.C.A., by the Department of Public Safety, Drivers License Division (R. 44).

On or about November 2, 1994, appellant, through his counsel, appeared for the purpose of this "per se" hearing. Neither the arresting officer nor any witnesses appeared on behalf of the state at the informal hearing. The hearing officer received evidence, including, *inter alia*, the officers' reports, notice of citation, and an accident report dated October 8, 1994, (R. 47-50). A copy of the record of the division's proceedings, Findings and Conclusions is appended hereto in the appendix.

Pursuant to letter dated November 2, 1994, the Drivers License Division decided to "take no action" and did not suspend, deny or revoke appellant's driving privilege (R. 52).

An Information was filed on or about December 12, 1994, in the trial court relating to the same offense which had come before the Drivers License Division, said Information alleging, *inter alia*, D.U.I. with injury, a class A misdemeanor, pursuant to § 41-6-44, U.C.A. and Failure to Stop at the Scene of an Injury Accident, pursuant to § 41-6-31, U.C.A., (R. 1-3).

On or about February 21, 1995, appellant filed a Motion to Dismiss Count I of the Information (D.U.I. with injury) on the basis of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and Article One, Section 12, Utah State Constitution (R. 28-91). The state responded with a memorandum in opposition thereto on or about March 14, 1995 (R. 94-115). The issues were submitted on briefs without argument and the trial court denied appellant's Motion to Dismiss by Memorandum Decision on or about April 18, 1995 (R. 120-125).

SUMMARY OF ARGUMENT

The decision of the Drivers License Division pursuant to § 53-3-223, U.C.A., is the functional equivalent of a first prosecution for D.U.I. subjecting appellant to punishment. The appellant was thereby placed in jeopardy. A second prosecution for the same

offense under § 41-6-44, U.C.A., is therefore barred by the Fifth Amendment of the United States Constitution and Article One, Section 12, Utah State Constitution.

ARGUMENT

The hearing before of the Drivers License Division is the functional equivalent of a first prosecution. A subsequent trial for the same offense is a separate proceeding barred by the Fifth Amendment of the United States Constitution and Article One, Section 12, Utah State Constitution.

A. DOUBLE JEOPARDY GENERALLY

The Fifth Amendment of the *United States Constitution* (reference to which hereinafter also includes Article One, Section 12, *Utah State Constitution*) provides as follows:

> No . . .person (shall) be subject for the same offense to be twice put in jeopardy of life or limb. . . .

The so-called Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. See, *North Carolina v. Pierce*, 395 U.S. 711, 717, 23 L.Ed 2d, 656, 89 S. Ct., 2072 (1969). The text of the Amendment mentions only harm to "life or limb", however it is well settled that the Amendment covers imprisonment, monetary sanctions, and other penalties. See, *e.g.*, *Ex Parte Lang*, 18 Wall

163, 21 L.Ed 872 (1874); *United States v. Halper*, 490 U.S. 435, 104 L.Ed 2d 487, 109 S. Ct. 1892 (1989).

The Double Jeopardy Clause of the Fifth Amendment is a guaranty which applies to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 23 L.Ed 2d 707, 89 S. Ct. 2056 (1969).

B. RECENT U.S. SUPREME COURT DECISION REGARDING DOUBLE JEOPARDY.

Until relatively recently, civil sanctions were not considered to be punishment for double jeopardy purposes. See, *e.g.*, *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). However, that position was clearly abandoned in *United States v. Halper*, 490 U.S. 435 (1989), which held that "the labels 'criminal' and 'civil' are not paramount in determining whether a sanction constitutes punishment for double jeopardy purposes":

> The notion of punishment, as we understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment the Double Jeopardy Clause, we must follow the notion where it leads.

U.S. v. Halper, 490 U.S. 447-448.

The new test for determining whether a sanction, regardless of how it is labelled, civil, quasi-criminal, or otherwise,

constitutes "punishment" for double jeopardy purposes, is stated as follows:

> A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment. . . .

Id. at 448.

The Supreme Court reasserted this holding four years later in the context of the Eighth Amendment's provision against excessive fines and forfeitures in *Austin v. United States*, 113 S. Ct. 2801 (1993). Under *Austin*, to determine whether a forfeiture constitutes 'punishment', the court looks at the entire scope of the statute which the government seeks to employ rather than to the characteristics of the specific property the government seeks to forfeit.

Holding a contraband tax hearing to be separate and penal in nature, and therefor the subject of jeopardy, in *Montana Department of Revenue v. Kurth Ranch*, 511 U.S. 128, 128 L.Ed 2d 767, (1994), the United States Supreme Court again reasserted that "the labels 'criminal' and 'civil' are not of paramount importance". *Kurth*, 128 L. Ed 2d at 777, citing *United States v. Halper*, *supra*.

In *Kurth Ranch* the Supreme Court evaluated the entire scope of a Montana statute, which sought to tax the possession and storage of dangerous drugs and sustained dismissal of a subsequent "tax"

assessment for substantially the same misconduct on double jeopardy grounds. The holding in *Kurth Ranch* is that under certain circumstances civil penalties, in that case a tax on marijuana possession imposed by state statute, may constitute a punishment for purposes of analysis under the Fifth Amendment's Double Jeopardy Clause. In finding the civil assessment to be barred by a previous criminal trial on double jeopardy grounds, *Kurth* affirms *Halper* and advances considerations under which a civil penalty may be characterized as punitive.

The court stated in *Kurth Ranch* that criminal sanctions, civil penalties, civil forfeitures, and taxes all share certain aspects in common: some generate governmental revenues, all impose certain burdens on individuals (often physical), and deter certain behavior. "All of these sanctions are subject to constitutional restraints." *Kurth*, 128 L.Ed 2d at 778.

One of these constraints, of course, is the issue of double jeopardy which is discussed thoroughly in the *Kurth* case.

The Supreme Court's analysis of the Montana forfeiture tax statute discusses several features of the Montana statute which set it apart from a mere revenue raising statute. The fact that one proceeding was denoted as 'civil' and the other 'criminal' was not among the factors considered. The court states,

> First, this so-called tax is conditioned on the commission of a crime. That condition is

> "significant of penal and prohibitory intent rather than the gathering of revenue". . . . In this case the tax assessment not only hinges on the commission of a crime, it is also exacted only after the tax payor has been arrested for the precise conduct that gives rise to the tax obligation in the first place. . . .
> Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue raising purpose that are imposed despite their adverse effect on the taxed activity. But they differ as well from mixed motive taxes that governments impose both to deter a disfavored activity and to raise money (such as with the tax on cigarettes and tobacco). . . . These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.
>
> The (administrative) proceedings Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time for "the same offense". *Id.* 114 S. Ct. at 1947-48. (emphasis added.)

The considerations which the court in *Kurth* found to be relevant were (1) the high tax rate specified by the statute, (2) the statute's purpose of deterring unlawful activity, and the fact (3) that the tax is conditioned upon commission of crime, (4) is exacted only after taxpayer's arrest for conduct giving rise to tax obligation, and (5) is levied on goods, which the taxpayer no longer owns or possess. Under these conditions, the Montana tax on confiscated marijuana violated the Double Jeopardy Clause's

protection against successive punishments when imposed in proceeding subsequent to taxpayer's drug prosecution.

The court in *Kurth Ranch* held that Montana's tax law was fairly characterized as a punishment. Applying the arguments made there to the circumstances presented here, it is obvious that a ninety days or one year driver's license suspension is intended at least in part to be a deterrent and penalty, *i.e.*, a punishment for the purpose of double jeopardy analysis. It certainly is not solely remedial, as is required under *Halper* to escape the characterization of punishment under the Fifth Amendment. *Halper*, 490 U.S. 447-448.

It is not claimed here that the Double Jeopardy Clause bars cumulative punishments imposed in a single proceeding. Punishments may be a combination of incarceration, fine, forfeiture, consecutive terms in prison, and consecutive terms of incarceration, *etc*. See, *United States v. Torres*, 28 F.3d 1463 (7th Cir. 1994) at 1464. Indeed, Utah State statutes provide that if a conviction arises for D.U.I., suspension for 90 days on a first offense is part of the automatic sanction which will be imposed by the division. Section 41-6-44, U.C.A. The division's decision letter to the appellant makes this clear (R. 52).

The problem is that there were separate proceedings, two hearings, each of which producing the potential for separate punishment for a single offense.

As noted in *Torres* at 1465,

> But if as *Kurth Ranch* holds a civil proceeding to collect a monetary penalty for crime counts as an independent "jeopardy" it does not require much imagination to see the problem. Civil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema.

Shortly after the decision in *Kurth Ranch*, *supra*, the Ninth Circuit applied its reasoning to civil forfeitures. See, *U.S. v. McCaslin*, 863 F. Supp. 1299 (W.D. Wash. 1994), holding that multiple punishments are permissible under the Double Jeopardy Clause only if imposed in the same proceeding and are barred if imposed in separate proceedings. See also, *United States of America v. $405,089.23 U.S. Currency*, 33 F.3d 1210, (9th Cir. 1994), holding that civil forfeiture proceedings constituted "a separate proceeding" resulting in convictions for the purpose of double jeopardy, that the civil forfeiture constituted "punishment" which triggered protections of double jeopardy and that criminal prosecution and civil forfeiture action based upon the same offense had to be brought in the same proceeding.

C. THE APPELLANT WAS PLACED IN JEOPARDY AT THE PRIOR HEARING BEFORE THE DRIVERS LICENSE DIVISION.

The Drivers License Division hearing with respect to the alleged driving under the influence of alcohol of the appellant is necessarily based upon the same facts and circumstances as would be the prosecution for driving under the influence of alcohol in this case pursuant to § 41-6-44, U.C.A. (A copy of § 41-6-44, U.C.A. is contained in the appendix.)

The statute under which the division attempted to suspend appellant's license is § 53-3-223, U.C.A. (See, letter to defendant, R. 45; a copy of § 53-3-223, U.C.A., is contained in the appendix.)

Section 53-3-223, U.C.A., provides that if a peace officer has reasonable grounds to believe that a person may be in violation of § 41-6-44, U.C.A., he may request the defendant to take a chemical/alcohol test and, if the accused submits to the test, thereafter serve notice upon the person of intent to suspend his license and right to be heard, upon request therefor, within 30 days before the division. After such hearing the division is authorized, upon a finding that a "...peace officer had reasonable grounds to believe the person was driving a motor vehicle in violation of §41-6-44..." (§ 53-3-223(6)(c)(i), U.C.A.), to suspend the person's license to drive provided as follows,

> (7)(a). A first suspension, whether ordered or not challenged under this section, is for a period of 90 days, beginning on the 30th day after the date of arrest. (b) A second or subsequent suspension under this subsection is for a period of one year, beginning on the 30th day after the date of arrest. 53-3-223, U.C.A.

The fact that no live witnesses appeared or testified at the hearing is of no consequence under Utah law. In Cordova v. Blackstock, 861 P.2d 449, (Utah App. 1993), the Court of Appeals reversed the district court's finding that it was not compelled to hold a trial *de novo* where the record of the division failed, in the trial court's opinion, to satisfy the "*residuum* of competent evidence" rule. The appellate court held that even though neither the officers nor the petitioner nor any other witness or person appeared on behalf of either side at the division's suspension hearing, the administrative agency, based upon evidence of the officer's report, test records, and affidavits, was competent to make a decision with respect to the suspension of Cordova's driving privileges. Cordova further held that the statutory scheme with respect to suspension or revocation of drivers' licenses provides for "informal adjudicative proceedings", reviewable by trial *de novo* only, and that the decision of the administrative agency based solely upon the arrest record and affidavits and documents submitted was competent to constitute basis for a decision, *i.e.*, it was a "hearing". Therefore, the appellant was clearly placed in

jeopardy of having his license suspended at the hearing before the division.

It makes no difference that in this case the appellant was not "punished" as a result of the "per se" hearing. A finding of "no action" constitutes former jeopardy to the same extent as if the division had taken the appellant's license. This serves the underlying purpose of the Double Jeopardy Clause - - protecting a person who has been acquitted from having to "run the gauntlet" a second time. *Ashe v. Swenson*, 397 U.S. 442, 446 (1970).

D. SUSPENSION IS A PENALTY.

The suspension of the driver's license is clearly a "penalty". Ninety days without a driver's license is obviously in the nature, at least to a substantial degree, of a sanction and a penalty. This is reinforced by the fact that a second such incident would result in suspension for the period of a full year as set forth in § 53-3-223(7)(b), U.C.A. Greater punishment is applied if one fails to learn the lesson the first time.

The sanctions imposed by § 41-6-44, U.C.A., (fine, imprisonment, *etc.*) take place separately and wholly independent from § 53-3-223, U.C.A. The penalty under Title 53 is imposed regardless of the outcome at trial under Title 44. The driver's license suspension, however, is mandated under both sections. Section 41-6-44(12), U.C.A., states:

> (b) The department shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

The additional penalty of 90 days/one year license suspension as a consequence of violating § 41-6-44 as provided in section (12), lends weight to the argument that this is a punishment in addition to fines and jail time.

The legislature's own statement applicable at the time of this offense that the "primary purpose" of the suspension statutes pursuant to Title 53 relating to D.U.I.'s is "protecting persons on highways by quickly removing from the highways those persons who have shown they are safety hazards", § 53-3-222, U.C.A., prior to 1995 amendment, leaves latitude for the other obvious purposes, *e.g.*, deterrence, retribution and punishment. Indeed, speaking to the issue of summary suspensions, the United States Supreme Court stated, "[f]irst, the very existence of the summary sanction of the statute serves as a deterrent to drunken driving." *Mackey v. Montrym*, 443 U.S. 1 at 18 (1979).

If the 90 day/one year suspension were not a deterrent and punishment, there would be no reason, in practice, for a D.U.I. defendant to plead to the "lesser" charge of reckless driving, § 41-6-45, U.C.A., which carries no license suspension penalty.

Since it is deemed a first offense on a second or subsequent conviction for D.U.I. pursuant to § 41-6-44(9)(b), the only advantage to such a reduced charge plea is avoidance of sanctions, often the same fine and/or jail time but without the 90 day/one year suspension. An optimum scenario for the D.U.I. defendant is to "win" the per se hearing and plead to an "alcohol related" reckless driving, thus preserving the driving privilege and escaping the substantial penalty of loss of the driving privilege, regardless of whether the court levies the same fine and/or jail as it would for a D.U.I.

In this society where public transportation is either non-existent or is, at best, inadequate and entire commercial shopping areas are located in suburbs surrounding our cities, we can no longer view a driver's license as merely a privilege which is given by the State and which is subject to revocation at any time. Having a driver's license has now taken on greater meaning. A driver's license is a substantial right which may not be deprived without due process.

In enacting § 53-3-223, U.C.A., the legislature clearly intended at least in part to institute a penalty designed to deter drunk driving in contemplation of swift punishment. Section 53-3-223, U.C.A., is, at the very least, partly punitive as it acts to

punish individual conduct, focusing on the culpability of a specific driver, rather than serving general remedial purposes.

CONCLUSION

For the reasons set forth in *Kurth* the appellant asserts that the prosecution under Count I of the amended Information is the "functional equivalent of successive criminal prosecution" placing the defendant in jeopardy a second time "for the same offense." *Kurth* at 782. Clearly, § 53-3-227, U.C.A., provides for (1) a separate proceeding, and (2) a punishment. As such, it amounts to jeopardy.

The Double Jeopardy Clause of Article One, Section 12 of the *Utah State Constitution* should also be held to be violated by this same activity. The Utah State Supreme Court has specifically held that the constitutional guaranty against double jeopardy affords a criminal defendant three separate protections by prohibiting (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *State v. Trafny*, 799 P.2d 704 (Utah 1990), *citing* *State v. Miller*, 747 P.2d 400 (Utah 1987).

The decision in *Kurth Ranch* requires Utah courts to revisit decisions such as *Simms v. Tax Commission*, 841 P.2d 6 (Utah 1992), which incidently concedes that proceedings such as that for the

revocation of an individual's driving privilege, is like a criminal proceeding, is to penalize for the commission of an offense against the law, and is "*quasi* criminal in character".

The trial court's conclusion that the department's decision not to suspend the appellant's driver's license was not a prior separate proceeding subjecting him to punishment should be reversed and remanded with directions for the trial court to set aside the appellant's conviction and grant the appellant's motion on double jeopardy grounds.

DATED this 28 day of August, 1995.

HERSCHEL BULLEN
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 29 day of Aug., 1995, I caused 2 true and exact copies of the foregoing document to be mailed, via U.S. First Class Mail, postage prepaid, to the following:

District Attorney's Office
2001 South State Street, #S-3700
Salt Lake City, Utah 84190

By: _____

C:\WP60\FILES\CRIMINAL\STATE\TENWOLDE\BRIEF.001

APPENDIX A

DEPARTMENT OF PUBLIC SAFETY
E11-02-174
DRIVER LICENSE DIVISION

PER - SE NOT -A- DROP

Findings of Proceedings

Date of Hearing	Time Set For Hearing
November 02,94	9:00 AM

Name and Address of Attorney

Herschel Bullen
2749 Parleys Way
Salt Lake City, Utah 84109

Witness: Sylvia L. Stewart Magna

Witness: Marie Eklund Magna

Name and Address of Driver

Allen Garrett Tenwolde
8689 West Edith Dr.
Magna, Utah 84044

Date of Birth	DL Number
11/14/1966	146388879

Date of Arrest: October 08,1994

Location of Hearing: Rose Park Driver License Div

Hearing Officer: Paul T. Finlinson

Arresting Officer: Dep. Dwayne Anjewierd

Agency: Salt Lake Sheriff O

Witness: Dep. R. Nielsen

Witness: Dep. K. Mattingly

OPENING STATEMENT

This hearing is being conducted at the driver's request in accordance with the Utah Administrative Procedures Act and

☒ 53-3-223 U C A , following his/her arrest for driving under the influence of alcohol and/or drugs

☐ 41-6-44 4 U C A , following his/her arrest for driving with measurable alcohol in the body.

☐ 41-6-44 6 U.C A , following his/her arrest for driving with measurable controlled substance or metabolite of a controlled substance in the body.

The issues to be determined are If the peace officer had grounds to believe the driver violated U C A 41-6-44/32A-12-209/41-6-44 6, if the driver was requested to submit to a chemical test or tests and the test results

All formalities required in court proceedings need not be used in this hearing However, the Division shall substantially comply with the fundamental rules of due process Sworn testimony will be taken and the parties may have witnesses testify. The driver may testify and may cross examine others who testify

If the license is denied or suspended, the driver has the right within 30 days, to petition the proper court for an appeal hearing

Those testifying will be sworn and the hearing shall proceed.

****

The following documents and information are part of the records for this hearing:

Yes	No	
☒	☐	The officer's report submitted in compliance with Utah Code Ann 53-3-223/41-6-44 4/41-6-44 6
☒	☐	Notice and citation served by the officer of the Department's intent to deny/suspend and information on how to receive a hearing by the Department
☒	☐	Hearing request made within ten days.
☐	☐	Record of test results, if any Blood test pending?
☐	☐	Operational checklist of test instrument

47

DI-1006
Rev 4-94

Yes ☐ No ☐ Department of Public Safety affidavit that indicates the breath testing instrument was checked in accordance with standards set forth in 41-6-44 3 U C A.

N/A ☐ X (One) ☐ Other (i e., Documents and/or information received in behalf of the driver and/or other evidence received which is made official record for the purpose of this hearing).
Explain 1. Accident Report C# 94-136130 on 10/08/1994 by Dep. R. Nielsen. 2 Pages

TESTIMONY AND EVIDENCE PRESENTED

2. Supplemental Report. 3 Pages.

1 Sworn testimony of officer
Deputy Dwayne Anjewierden, SLCSO

a. Following are the facts and conclusions presented by the peace officer leading to belief that the party had been driving or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, or a combination of alcohol and any drug or with measurable alcohol, controlled substance or metabolite in the body.
Deputy Anjewierden, SLCSO, didnot appear.

b The driver was placed under arrest Yes ☒ No ☐ Charge(s) Violation of 41-6-44 UCA

The driver was requested to submit to a chemical test Yes ☐ No ☐

c The driver was advised prior to the chemical test that the test results could result in denial/suspension of his/her driving privilege

Yes ☐ No ☐

The driver refused to submit to chemical test Yes ☐ No ☐

d Officer who administered chemical test was certified to do so Yes ☐ No ☐

e Proper Department procedure and rules were followed by the peace officer in the administration of the chemical test.

Yes ☐ No ☐

(1) Evidence and/or information was received indicating the test machine was ☐ was not ☐ properly working.

(2) The driver submitted to a chemical test as requested by a peace officer showing a test result of

Pending? % alcohol,
☐ Controlled substance,
☐ Metabolite of a controlled substance.

2. Testimony by witness officer or other witness(es) Name: None Taken

3. Substance of testimony or evidence by driver or witness(es): Allen Garrett Tenwolde DOB: 11/14/1966

The Driver didnot appear. No reason known.

4. Substance of statement and/or questions by driver's legal counsel: In Behalf; Herschel Bullen, Attorney a Council did appear.

PRESIDING OFFICER'S FINDINGS OF FACT AND CONCLUSION OF LAW:

A. The peace officer had reason to believe that the driver had ☐ had not ☐ violated U.C.A. 41-6-44/32A-12-209/41-6-44.6 and was arrested for the same.

B. The driver was ☐ was not ☐ advised of the possible denial/suspension/revocation of his/her driving privilege.

C. After proper warning, the driver did ☐ did not ☐ submit to a chemical test.

D. The chemical test was ☐ was not ☐ administered by an officer/medical person certified to do so.

E. Proper procedures and standards were ☐ were not ☐ followed by the peace officer to insure the operation of the test machine to be reliable, with the results of Pending? %.

F. Test results indicate ☐ a controlled substance ☐ metabolite of a controlled substance.

G. Department of Public Safety affidavit indicated the breath testing instrument used was☒ was not ☐ reliable and in proper working order according to Department Standards (UCA 41-6-44.3).

H. All procedures and requirements were ☒ were not ☐ followed by the reporting officer pursuant to U.C.A. 53-3-223, 41-6-44.4 or 41-6-44.6. (Explain what procedures were not followed, if any):

I. Officer did ☐ did not ☒ appear.

Reasons (non-appearance): Deputy Dwayne Anjewierden, SLCSO, didnot appear. No reason known.

J. Additional findings of fact not covered above:

CONCLUSIONS:

BASED UPON THE FOREGOING FINDINGS OF FACT, IT IS CONCLUDED THAT ALL OF THE STATUTORY PROVISIONS REQUIRED TO DENY/SUSPEND/REVOKE THE DRIVING PRIVILEGE WERE ☐ WERE NOT ☒ PROVIDED IN THIS CASE, AND THE FOLLOWING DECISION IS RENDERED:

☐ To deny, suspend or revoke the driving privilege by authority of Utah Code Ann. 53-3-223, 41-6-44.4 or 41-6-44.6.

☒ Take No Action:
Explain: Deputy Dwayne Anjewierden SLCSO, didnot appear. #14

Comments by Presiding Officer:

Presiding Officer: [signature]

Reviewed by: [signature] Title: [illegible]

APPENDIX B

§ 41-6-44

(7) Each local authority shall pay for providing, training, and supervising school crossing guards in accordance with this section.

History: C. 1953, 41-6-20.1, enacted by L. 1992, ch. 91, § 2; 1994, ch. 66, § 1; 1994, ch. 120, § 53.

Amendment Notes. — The 1994 amendment by ch. 66, effective May 2, 1994, deleted "Before January 1, 1993" from the beginning of Subsection (2); deleted former Subsection (2)(b), adding comparable language to the end of Subsection (2)(a); deleted former Subsection (3)(b), which provided for the maintenance of reduced speed school zones for state highways as required under Section 41-6-21; added a proviso at the end of Subsection (3)(b)(ii); added Subsection (3)(c); and made related changes.

The 1994 amendment by ch. 120, effective May 2, 1994, deleted "(a) Before January 1, 1993" at the beginning of Subsection (2); redesignated former Subsections (2)(a)(i) and (2)(a)(ii) as Subsections (2)(a) and (2)(b); deleted former Subsection (2)(b), the substance of which was incorporated into Subsection (2)(a) by the addition of "after written assurance by a local authority that the local authority will comply with Subsections (3) and (4)"; redesignated the subsections in Subsection (3) and deleted former Subsection (3)(b), which read "Notwithstanding Subsection (a)(ii)(B) the department shall provide for the maintenance of reduced speed school zones for state highways as required under Section 41-6-21"; substituted "Department of Transportation" for "Transportation Commission" in Subsection (6); and made stylistic changes.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

ARTICLE 4

ACCIDENTS

41-6-29. Operator's duty at accident — Stop at accident — Penalty.

NOTES TO DECISIONS

Corpus delicti.

In order for the state to establish corpus delicti, the state must establish by clear and convincing evidence that the person who left the scene was in fact the driver of the vehicle and not merely a passenger. State v. Hansen, 857 P.2d 978 (Utah Ct. App. 1993).

ARTICLE 5

DRIVING WHILE INTOXICATED AND RECKLESS DRIVING

41-6-44. Driving under the influence of alcohol, drugs, or with specified or unsafe blood alcohol concentration — Measurement of blood or breath alcohol — Criminal punishment — Arrest without warrant — Penalties — Suspension or revocation of license — Penalties.

(1) (a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(i) has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control; or

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(2) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) (a) A person convicted the first or second time of a violation of Subsection (1) is guilty of a:

(i) class B misdemeanor; or

(ii) class A misdemeanor if the person:

(A) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner; or

(B) had a passenger under 16 years of age in the vehicle at the time of the offense.

(b) In this section, the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(c) In this section, a reference to this section includes any similar local ordinance adopted in compliance with Section 41-6-43.

(4) (a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours nor more than 240 hours.

(b) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 24 hours nor more than 50 hours.

(c) (i) In addition to the jail sentence or community-service work program, the court shall order the person to participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility, as appropriate.

(ii) For a violation committed after July 1, 1993, the court may order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility if the licensed alcohol or drug dependency rehabilitation facility determines that the person has a problem condition involving alcohol or drugs.

(5) (a) Upon a second conviction for a violation committed within six years of a prior violation under this section the court shall as part of any sentence impose a mandatory jail sentence of not less than 240 consecutive hours nor more than 720 hours.

(b) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 80 hours nor more than 240 hours.

(c) In addition to the jail sentence or community-service work program, the court shall order the person to participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility, as appropriate. The court may, in its discretion, order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility.

(6) (a) A third conviction for a violation committed within six years of two prior violations under this section is a:

(i) class B misdemeanor except as provided in Subsections (ii) and (7); and

(ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

(b) (i) Under Subsection (a)(i) the court shall as part of any sentence *impose a mandatory jail sentence of not less than 720 nor more than* 2,160 hours.

(ii) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 240 nor more than 720 hours.

(iii) In addition to the jail sentence or community-service work program, the court shall order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility, as appropriate.

(c) (i) Under Subsection (a)(ii) the court shall as part of any sentence impose a fine of not less than $1,000 and impose a mandatory jail sentence of not less than 720 hours nor more than 2,160 hours.

(ii) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 240 nor more than 720 hours, but only if the court enters in writing on the record the reason it finds the defendant should not serve the jail sentence. Enrollment in and completion of an alcohol or drug dependency rehabilitation program approved by the court may be a sentencing alternative to incarceration or community service if the program provides intensive care or inpatient treatment and long-term closely supervised follow through after the treatment.

(iii) In addition to the jail sentence or community-service work program, the court shall order the person to obtain treatment at an *alcohol or drug dependency rehabilitation facility.*

(7) (a) A fourth or subsequent conviction for a violation committed within six years of the prior violations under this section is a third degree felony if at least three prior convictions are for violations committed after April 23, 1990.

(b) The court shall as part of any sentence impose a fine of not less than $1,000 and impose a mandatory jail sentence of not less than 720 hours nor more than 2,160 hours.

(c) (i) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 240 nor more than 720 hours, but only if the court enters in writing on the record the reason it finds the defendant should not serve the jail sentence.

(ii) Enrollment in and completion of an alcohol or drug dependency rehabilitation program approved by the court may be a sentencing alternative to incarceration or community service if the program provides intensive care or inpatient treatment and long-term closely supervised follow through after the treatment.

(d) In addition to the jail sentence or community-service work program, the court shall order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility.

(8) (a) The mandatory portion of any sentence required under this section may not be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation under this section may not be terminated.

(b) The department may not reinstate any license suspended or revoked as a result of the conviction under this section, until the convicted person has furnished evidence satisfactory to the department that:

(i) all required alcohol or drug dependency assessment, education, treatment, and rehabilitation ordered for a violation committed after July 1, 1993, have been completed;

(ii) all fines and fees including fees for restitution and rehabilitation costs assessed against the person have been paid, if the conviction is a second or subsequent conviction for a violation committed within six years of a prior violation; and

(iii) the person does not use drugs in any abusive or illegal manner as certified by a licensed alcohol or drug dependency rehabilitation facility, if the conviction is for a third or subsequent conviction for a violation committed within six years of two prior violations committed after July 1, 1993.

(9) (a) (i) The provisions in Subsections (4), (5), (6), and (7) that require a sentencing court to order a convicted person to: participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility; obtain, in the discretion of the court, treatment at an alcohol or drug dependency rehabilitation facility; obtain, mandatorily, treatment at an alcohol or drug dependency rehabilitation facility; or do any combination of those things, apply to a conviction for a violation of Section 41-6-45 that qualifies as a prior conviction under Subsection (10).

(ii) The court shall render the same order regarding education or treatment at an alcohol or drug dependency rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under Section 41-6-45 that qualifies as a prior conviction under Subsection (10), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), (6), and (7).

(b) For purposes of determining whether a conviction under Section 41-6-45 that qualified as a prior conviction under Subsection (10), is a first, second, or subsequent conviction under this subsection, a previous conviction under either this section or Section 41-6-45 is considered a prior conviction.

(c) Any alcohol or drug dependency rehabilitation program and any community-based or other education program provided for in this section shall be approved by the Department of Human Services.

(10) (a) (i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45 or of an ordinance enacted under Section 41-6-43 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.

(ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.

(b) (i) The court shall advise the defendant before accepting the plea offered under this subsection of the consequences of a violation of Section 41-6-45 as follows.

(ii) If the court accepts the defendant's plea of guilty or no contest to a charge of violating Section 41-6-45, and the prosecutor states for the record that there was consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation, the resulting conviction is a prior conviction for the purposes of Subsections (5), (6), and (7).

(c) The court shall notify the department of each conviction of Section 41-6-45 that is a prior offense for the purposes of Subsections (5), (6), and (7).

(11) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

(12) (a) The Department of Public Safety shall:

(i) suspend for 90 days the operator's license of a person convicted for the first time under Subsection (1); and

(ii) revoke for one year the license of a person convicted of any subsequent offense under Subsection (1) if the violation is committed within a period of six years from the date of the prior violation.

(b) The department shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

History: L. 1941, ch. 52, § 34; C. 1943, 57-7-111; L. 1949, ch. 65, § 1; 1957, ch. 75, § 1; 1967, ch. 88, § 2; 1969, ch. 107, § 2; 1977, ch. 268, § 3; 1979, ch. 243, § 1; 1981, ch. 63, § 2; 1982, ch. 46, § 1; 1983, ch. 99, § 13; 1983, ch. 103, § 1; 1983, ch. 183, § 33; 1985, ch. 46, § 1; 1986, ch. 122, § 1; 1986, ch. 178, § 29; 1987, ch. 138, § 37; 1987 (1st S.S.), ch. 8, § 2; 1988, ch. 17, § 1; 1990, ch. 183, § 16; 1990, ch. 299, § 1; 1991, ch. 147, § 1; 1993, ch. 168, § 1; 1993, ch. 193, § 1; 1993, ch. 234, § 32; 1994, ch. 159, § 1; 1994, ch. 263, § 1.

Amendment Notes. — The 1994 amendment by ch. 159, effective March 17, 1994, added Subsection (3)(a)(ii)(B), making related changes, and substituted "Section 53-3-223" for "41-2-130" in Subsection (12)(b).

The 1994 amendment by ch. 263, effective May 2, 1994, subdivided Subsection (12)(a), substituted "53-3-223" for "41-2-130" in Subsection (12)(b), and made stylistic changes.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

NOTES TO DECISIONS

Searches.

In a prosecution for driving under the influence of alcohol, exigent circumstances, including the concern of the police about the dissipation of blood alcohol and the possible loss or corruption of that evidence, justified a warrantless search of defendant's home. City of Orem v. Henrie, 868 P.2d 1384 (Utah Ct. App. 1994).

41-6-44.3. Standards for chemical breath analysis — Evidence.

NOTES TO DECISIONS

Failure to comply with standards.

Failure to comply fully with standards established by the Department of Public Safety does not necessarily make breath test evidence inadmissible. It simply means that the foundation and validity of the evidence may not be presumed, but rather that they will have to be established in order for the evidence to be admitted. Salt Lake City v. Emerson, 861 P.2d 443 (Utah Ct. App. 1993).

41-6-44.6. Definitions — Driving with any measurable controlled substance in the body — Penalties — Arrest without warrant.

(1) As used in this section:

(a) "Controlled substance" means any substance scheduled under Section 58-37-4.

(b) "Practitioner" has the same meaning as provided in Section 58-37-2.

(c) "Prescribe" has the same meaning as provided in Section 58-37-2.

(d) "Prescription" has the same meaning as provided in Section 58-37-2.

§ 41-6-44.10

41-6-44.10. Implied consent to chemical tests for alcohol or drug — Number of tests — Refusal — Warning, report — Hearing, revocation of license — Appeal — Person incapable of refusal — Results of test available — Who may give test — Evidence.

(1) (a) A person operating a motor vehicle in this state is considered to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44 or 41-6-44.4, while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6, if the test is or tests are administered at the direction of a peace officer having grounds to believe that person to have been operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44 or 41-6-44.4, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6.

(b) (i) The peace officer determines which of the tests are administered and how many of them are administered.

(ii) If an officer requests more than one test, refusal by a person to take one or more requested tests, even though he does submit to any other requested test or tests, is a refusal under this section.

(c) (i) A person who has been requested under this section to submit to a chemical test or tests of his breath, blood, or urine, may not select the test or tests to be administered.

(ii) The failure or inability of a peace officer to arrange for any specific chemical test is not a defense to taking a test requested by a peace officer, and it is not a defense in any criminal, civil, or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

(2) (a) If the person has been placed under arrest, has then been requested by a peace officer to submit to any one or more of the chemical tests under Subsection (1), and refuses to submit to any chemical test requested, the person shall be warned by the peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of the person's license to operate a motor vehicle.

(b) Following the warning under Subsection (a), if the person does not immediately request that the chemical test or tests as offered by a peace officer be administered a peace officer shall serve on the person, on behalf of the Driver License Division, immediate notice of the Driver License Division's intention to revoke the person's privilege or license to operate a motor vehicle. When the officer serves the immediate notice on behalf of the Driver License Division, he shall:

(i) take the Utah license certificate or permit, if any, of the operator;

(ii) issue a temporary license effective for only 29 days; and

(iii) supply to the operator, on a form approved by the Driver License Division, basic information regarding how to obtain a hearing before the Driver License Division.

(c) A citation issued by a peace officer may, if approved as to form by the Driver License Division, serve also as the temporary license.

(d) The peace officer shall submit a signed report, within five days after the date of the arrest, that he had grounds to believe the arrested person had been operating or was in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44 or 41-6-44.4, while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6, and that the person had refused to submit to a chemical test or tests under Subsection (1).

(e) (i) A person who has been notified of the Driver License Division's intention to revoke his license under this section is entitled to a hearing.

(ii) A request for the hearing shall be made in writing within ten days after the date of the arrest.

(iii) Upon written request, the division shall grant to the person an opportunity to be heard within 29 days after the date of arrest.

(iv) If the person does not make a timely written request for a hearing before the division, his privilege to operate a motor vehicle in the state is revoked beginning on the 30th day after the date of arrest for a period of:

(A) one year unless Subsection (B) applies; or

(B) 18 months if the person has had a previous license sanction after July 1, 1993, under this section, Section 41-6-44.4, 41-6-44.6, or 53-3-223, or a conviction after July 1, 1993, under Section 41-6-44.

(f) If a hearing is requested by the person and conducted by the Driver License Division, the hearing shall be documented and shall cover the issues of:

(i) whether a peace officer had reasonable grounds to believe that a person was operating a motor vehicle in violation of Section 41-6-44, 41-6-44.4, or 44-6-44.6; and

(ii) whether the person refused to submit to the test.

(g) (i) In connection with the hearing, the division or its authorized agent:

(A) may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers; and

(B) shall issue subpoenas for the attendance of necessary peace officers.

(ii) The division shall pay witness fees and mileage from the Transportation Fund in accordance with the rates established in Section 21-5-4.

(h) If after a hearing, the Driver License Division determines that the person was requested to submit to a chemical test or tests and refused to submit to the test or tests, or if the person fails to appear before the Driver License Division as required in the notice, the Driver License Division shall revoke his license or permit to operate a motor vehicle in Utah beginning on the date the hearing is held for a period of:

(i) (A) one year unless Subsection (B) applies; or

(B) 18 months if the person has had a previous license sanction after July 1, 1993, under this section, Section 53-3-223, 41-6-44.4,

or 41-6-44.6, or a conviction after July 1, 1993, under Section 41-6-44.

(ii) The Driver License Division shall also assess against the person, in addition to any fee imposed under Subsection 53-3-205(14), a fee under Section 53-3-105, which shall be paid before the person's driving privilege is reinstated, to cover administrative costs.

(iii) The fee shall be cancelled if the person obtains an unappealed court decision following a proceeding allowed under this subsection that the revocation was improper.

(i) (i) Any person whose license has been revoked by the Driver License Division under this section may seek judicial review.

(ii) Judicial review of an informal adjudicative proceeding is a trial. Venue is in the district court in the county in which the person resides.

(3) Any person who is dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent provided for in Subsection (1), and the test or tests may be administered whether the person has been arrested or not.

(4) Upon the request of the person who was tested, the results of the test or tests shall be made available to him.

(5) (a) Only a physician, registered nurse, practical nurse, or person authorized under Section 26-1-30, acting at the request of a peace officer, may withdraw blood to determine the alcoholic or drug content. This limitation does not apply to taking a urine or breath specimen.

(b) Any physician, registered nurse, practical nurse, or person authorized under Section 26-1-30 who, at the direction of a peace officer, draws a sample of blood from any person whom a peace officer has reason to believe is driving in violation of this chapter, or hospital or medical facility at which the sample is drawn, is immune from any civil or criminal liability arising from drawing the sample, if the test is administered according to standard medical practice.

(6) (a) The person to be tested may, at his own expense, have a physician of his own choice administer a chemical test in addition to the test or tests administered at the direction of a peace officer.

(b) The failure or inability to obtain the additional test does not affect admissibility of the results of the test or tests taken at the direction of a peace officer, or preclude or delay the test or tests to be taken at the direction of a peace officer.

(c) The additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

(7) For the purpose of determining whether to submit to a chemical test or tests, the person to be tested does not have the right to consult an attorney or have an attorney, physician, or other person present as a condition for the taking of any test.

(8) If a person under arrest refuses to submit to a chemical test or tests or any additional test under this section, evidence of any refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, combination of alcohol and any drug, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body.

History: C. 1953, 41-6-44.10, enacted by L. 1981, ch. 126, § 43; 1983, ch. 99, § 16; 1987, ch. 129, § 3; 1987, ch. 138, § 41; 1987, ch. 161, § 143; 1987 (1st S.S.), ch. 8, §§ 3, 4; 1988, ch. 148, § 1; 1990, ch. 30, § 21; 1992, ch. 78, § 3; 1993, ch. 161, § 2; 1993, ch. 193,

§ 2; 1993, ch. 205, § 3; 1993, ch. 234, § 35; 1994, ch. 180, § 3.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, inserted "or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6" twice in Subsection (1)(a) and once in Subsection (2)(d); substituted "Section 41-6-44.4, 41-6-44.6, or 53-3-223" for "Section 41-2-130 or 41-6-44.4" in Subsection (2)(e)(iv)(B); inserted "41-6-44.4, or 44-6-44.6" in Subsection (2)(f)(i); substituted "53-3-223" for "41-2-130 or" and inserted "or 41-6-44.6" in Subsection (2)(h)(i)(B); and added "or while having any measurable controlled substance or metabolite of a controlled substance in the person's body" at the end of Subsection (8).

ARTICLE 6

SPEED RESTRICTIONS

41-6-46. Speed regulations — Safe and appropriate speeds at certain locations — Prima facie speed limits — Emergency power of the governor.

(1) A person may not operate a vehicle at a speed greater than is reasonable and prudent under the existing conditions, giving regard to the actual and potential hazards then existing, including when:

(a) approaching and crossing an intersection or railroad grade crossing;

(b) approaching and going around a curve;

(c) approaching a hill crest;

(d) traveling upon any narrow or winding roadway; and

(e) special hazards exist due to pedestrians, other traffic, weather, or highway conditions.

(2) If no special hazard exists, and subject to Subsection (4) and Sections 41-6-47 and 41-6-48, the following speeds are lawful:

(a) 20 miles per hour in a reduced speed school zone as defined in Section 41-6-20.1;

(b) 25 miles per hour in any urban district;

(c) 65 miles per hour on highways where this speed limit does not impair the ability of the state to qualify for federal highway funds; and

(d) 55 miles per hour in other locations.

(3) Except as provided in Section 41-6-48.5, any speed in excess of the limits provided in Subsection (2) is prima facie evidence that the speed is not reasonable or prudent and that it is unlawful.

(4) The governor by proclamation in time of war or emergency may change the speed limits on the highways of the state.

History: C. 1953, 41-6-46, enacted by L. 1978 (2nd S.S.), ch. 9, § 1; 1987, ch. 138, § 45; 1987 (1st S.S.), ch. 1, § 1; 1991, ch. 44, § 1; 1992, ch. 91, § 3; 1994, ch. 66, § 2; 1994, ch. 120, § 54.

Amendment Notes. — The 1994 amendment by ch. 66, effective May 2, 1994, rewrote Subsection (2)(a); deleted former Subsection (4), relating to the rule-making power of the Transportation Commission; and redesignated former Subsection (5) as Subsection (4).

The 1994 amendment by ch. 120, effective May 2, 1994, substituted "Subsection (4)" for "Subsection (5)" in Subsection (2); rewrote Subsection (2)(a); and also deleted former Subsection (4), redesignating former Subsection (5) as (4).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

§ 53-3-222

53-3-222. Purpose of revocation or suspension for driving under the influence.

The Legislature finds that a primary purpose of this title relating to suspension or revocation of a person's license or privilege to drive a motor vehicle for driving with a blood alcohol content above a certain level or while under the influence of alcohol, any drug, or a combination of alcohol and any drug, or for refusing to take a chemical test as provided in Section 41-6-44.10, is protecting persons on highways by quickly removing from the highways those persons who have shown they are safety hazards.

History: C. 1953, 41-2-19.5, enacted by L. 1983, ch. 99, § 5; renumbered by L. 1987, ch. 137, § 29; C. 1953, 41-2-129; renumbered by L. 1993, ch. 234, § 101.

Amendment Notes. — The 1993 amendment, effective July 1, 1993, renumbered this section, which formerly appeared as § 41-2-129, substituted "drive" for "operate," deleted ending language defining safety hazards as the influence of alcohol or drugs or refusing to take a chemical test, and made stylistic changes.

NOTES TO DECISIONS

Cited in Lopez v. Schwendiman, 720 P.2d 778 (Utah 1986).

§ 53-3-223

53-3-223. Chemical test for driving under the influence — Temporary license — Hearing and decision — Suspension and fee — Judicial review.

(1) (a) If a peace officer has reasonable grounds to believe that a person may be violating or has violated Section 41-6-44, prohibiting the operation of a vehicle with a certain blood or breath alcohol concentration and driving under the influence of any drug, alcohol, or combination of a drug and alcohol or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6, the peace officer may, in connection with arresting the person, request that the person submit to a chemical test or tests to be administered in compliance with the standards under Section 41-6-44.10.

(b) In this section, a reference to Section 41-6-44 includes any similar local ordinance adopted in compliance with Subsection 41-6-43(1).

(2) The peace officer shall advise a person prior to the person's submission to a chemical test that a test result indicating a violation of Section 41-6-44 or 41-6-44.6 shall, and the existence of a blood alcohol content sufficient to render the person incapable of safely driving a motor vehicle may, result in suspension or revocation of the person's license to drive a motor vehicle.

(3) If the person submits to a chemical test and the test results indicate a blood or breath alcohol content in violation of Section 41-6-44 or 41-6-44.6, or if the officer makes a determination, based on reasonable grounds, that the person is otherwise in violation of Section 41-6-44, the officer directing administration of the test or making the determination shall serve on the person, on behalf of the division, immediate notice of the division's intention to suspend the person's license to drive a motor vehicle.

(4) (a) When the officer serves immediate notice on behalf of the division he shall:

(i) take the Utah license certificate or permit, if any, of the driver;

(ii) issue a temporary license certificate effective for only 29 days; and

(iii) supply to the driver, on a form to be approved by the division, basic information regarding how to obtain a prompt hearing before the division.

(b) A citation issued by the officer may, if approved as to form by the division, serve also as the temporary license certificate.

(5) The peace officer serving the notice shall send to the division within five days after the date of arrest and service of the notice:

(a) the person's license certificate;

(b) a copy of the citation issued for the offense;

(c) a signed report on a form approved by the division indicating the chemical test results, if any; and

(d) any other basis for the officer's determination that the person has violated Section 41-6-44 or 41-6-44.6.

(6) (a) Upon written request, the division shall grant to the person an opportunity to be heard within 29 days after the date of arrest. The request to be heard shall be made within ten days of the date of the arrest.

(b) A hearing, if held, shall be before the division in the county in which the arrest occurred, unless the division and the person agree that the hearing may be held in some other county.

(c) The hearing shall be documented and shall cover the issues of:

(i) whether a peace officer had reasonable grounds to believe the person was driving a motor vehicle in violation of Section 41-6-44 or 41-6-44.6;

(ii) whether the person refused to submit to the test; and

(iii) the test results, if any.

(d) (i) In connection with a hearing the division or its authorized agent:

(A) may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers;

(B) may issue subpoenas for the attendance of necessary peace officers.

(ii) The division shall pay witness fees and mileage from the Transportation Fund in accordance with the rates established in Section 21-5-4.

(e) One or more members of the division may conduct the hearing.

(f) Any decision made after a hearing before any number of the members of the division is as valid as if made after a hearing before the full membership of the division.

(g) After the hearing, the division shall order whether the person's license to drive a motor vehicle is suspended or not.

(h) If the person for whom the hearing is held fails to appear before the division as required in the notice, the division shall order whether the person's license to drive a motor vehicle is suspended or not.

(7) (a) A first suspension, whether ordered or not challenged under this subsection, is for a period of 90 days, beginning on the 30th day after the date of the arrest.

(b) A second or subsequent suspension under this subsection is for a period of one year, beginning on the 30th day after the date of arrest.

(8) (a) The division shall assess against a person, in addition to any fee imposed under Subsection 53-3-205(14) for driving under the influence, a fee under Section 53-3-105 to cover administrative costs, which shall be paid before the person's driving privilege is reinstated. This fee shall be cancelled if the person obtains an unappealed division hearing or court decision that the suspension was not proper.

(b) A person whose license has been suspended by the division under this subsection may file a petition within 30 days after the suspension for a hearing on the matter which, if held, is governed by Section 53-3-224.

History: C. 1953, 41-2-19.6, enacted by L. 1983, ch. 99, § 6; 1987, ch. 129, § 2; renumbered by L. 1987, ch. 137, § 30; 1990, ch. 30, § 6; 1992, ch. 21, § 1; 1993, ch. 205, § 2; C. 1953, 41-2-130; renumbered by L. 1993, ch. 234, § 102; 1994, ch. 180, § 5.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, inserted "or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6" in Subsection (1)(a); inserted "or 41-6-44.6" in Subsections (2), (3), (5)(d), and (6)(c)(i); and inserted "21-5-4" in Subsection (6)(d)(ii).

53-3-227. Driving a motor vehicle prohibited while license denied, suspended, disqualified, or revoked — Penalties.

(1) A person whose license has been denied, suspended, disqualified, or revoked under this chapter or under the laws of the state in which his license was issued and who drives any motor vehicle upon the highways of this state while that license is denied, suspended, disqualified, or revoked shall be punished as provided in this section.

(2) A person convicted of a violation of Subsection (1), other than a violation specified in Subsection (3), is guilty of a class C misdemeanor.

(3) (a) A person is guilty of a class B misdemeanor whose conviction under Subsection (1) is based on his driving a motor vehicle while his license is suspended, disqualified, or revoked for:

(i) a refusal to submit to a chemical test under Section 41-6-44.10;

(ii) a violation of Section 41-6-44;

(iii) a violation of a local ordinance that complies with the requirements of Section 41-6-43;

(iv) a violation of Section 41-6-44.6;

(v) a violation of Section 76-5-207;

(vi) a criminal action that the person plead guilty to as a result of a plea bargain after having been originally charged with violating one or more of the sections or ordinances under this subsection;

(vii) a revocation or suspension which has been extended under Subsection 53-3-220 (2); or

(viii) where disqualification is the result of driving a commercial motor vehicle while the person's CDL is disqualified, suspended, canceled or revoked under Subsection 53-3-414(1).

(b) A person is guilty of a class B misdemeanor whose conviction under Subsection (1) is based upon his driving a motor vehicle while his license is suspended, disqualified, or revoked in his state of licensure for violations corresponding to the violations listed in Subsection (a).

(c) A fine imposed under this subsection shall be at least the maximum fine for a class C misdemeanor under Section 76-3-301.

History: L. 1933, ch. 45, § 29; C. 1943, 57-4-32; L. 1983, ch. 99, § 8; 1983, ch. 183, § 27; C. 1953, 41-2-28; renumbered by L. 1987, ch. 137, § 36; 1989, ch. 209, § 20; 1989,